National Council of HUD Locals
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH AFL-CIO
Council 222

June 29, 2021

MEMORANDUM FOR: Ashley Sheriff, Director, Real Estate Assessment Center, PE
Sonya Gaither, Director of Labor & Employee Relations Division, AHE

FROM: Salvatore T. Viola, President
AFGE National Council of HUD Locals No. 222

SUBJECT: Grievance of the Parties (GOP) concerning Real Estate Assessment Center (REAC) affected employees' changes in official duty stations and locality pay

Pursuant to Article 51, Sections 51.01(2) and (3) and 51.15 of the 2015 HUD-AFGE Agreement (Agreement, collective bargaining agreement, or CBA) and the Federal Service Labor-Management Relations Statute (Statute) at 5 U.S.C. § 7103(a)(9)(B) and (C) and 5 U.S.C. § 7121(b)(1)(C)(i), I am filing this Grievance of the Parties (GOP) with you on behalf of all Real Estate Assessment Center (REAC) affected bargaining-unit employees who REAC management notified that it was changing their official duty stations, and, therefore, locality pay to where their homes are physically located. The AFGE National Council of HUD Locals No. 222 (AFGE Council 222 or Union) has a statutory right to file a grievance on behalf of all affected bargaining-unit employees in accordance with 5 U.S.C. § 7103(a)(9)(B) and (C) and 5 U.S.C. § 7121(b)(1)(C)(i). *See United States Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (Agency) and National Federation of Federal Employees (NFFE) Local 2049 (Union)*, 67 FLRA 619, 621 (August 29, 2014), Footnote 26, and *United States Department of Veterans Affairs and National Association of Government Employees (NAGE)*, 72 FLRA 194 (April 23, 2021).

Grievance of the Parties Has Been Filed Timely

On May 21, 2021, through a conversation with Mr. Alejandro Hernández, former Headquarters Branch Chief of Labor and Employee Relations, I found out that REAC bargaining-unit employees were being notified of the change in their official duty stations and locality pay to the local commuting areas where their homes are physically located. The consequence of this change is that affected REAC bargaining-unit employees will receive substantial pay cuts in the thousands of dollars per year range due to lower locality pay in the local commuting areas near

their homes. Mr. Hernández claimed that this change was a correction of a mistake in the official duty station determinations in accordance with U.S. Office of Personnel Management (OPM) regulation at 5 CFR § 531.605.

Should HUD management allege that the instant GOP has been filed untimely, please be advised that for grievance timeliness filing purposes, when an agency notifies an employee of a proposed action it is going to take, the effective date of the action is the controlling date for the calculation of the grievance filing deadline in arbitration case law according to Elkouri and Elkouri's How Arbitration Works, (Edited by Kenneth May, Arlington, VA: Bloomberg BNA Books, Seventh Edition, 2012), as quoted below:

> A party sometimes announces its intention to perform a given act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations arbitrators have held that the "occurrence" for purposes of applying time limits is at the later date. (Elkouri and Elkouri, How Arbitration Works, Seventh Edition, Chapter 5, pages 5-33 to 5-34)

Therefore, the calculation of the deadline to file the instant Grievance of the Parties would begin once the effective date of the proposed change is implemented for the affected REAC employees' official duty stations and the reductions in locality pay take effect. It is AFGE Council 222's understanding that the email notifications sent to affected REAC employees state that the effective date of the pay cut in locality pay is effective on or after June 6, 2021.

In any event, once HUD and REAC management cut the affected REAC employees' locality pay, it would be a continuing violation every pay period that the REAC employees are inappropriately paid the lower salaries. Pursuant to Article 51, Section 51.06(1) of the HUD-AFGE Agreement, a grievance concerning a continuing violation may be filed at any time. Elkouri and Elkouri's How Arbitration Works (Edited by Kenneth May, Arlington, VA: Bloomberg BNA Books, Seventh Edition, 2012), states the following regarding continuing violations:

> Many arbitrators have held that "continuing violations" of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence." …
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> … T]he "continuing violation" doctrine is especially viable for cases involving compensation, because it can be argued that each improper paycheck is a new violation. (Elkouri and Elkouri, How Arbitration Works, Seventh Edition, Chapter 5, page 5-28)

The FLRA will not overturn an arbitrator's finding that a grievance was filed timely on the basis of the continuing-violation doctrine; an arbitrator's determination of a continuing violation constitutes a ruling on procedural arbitrability. *See U.S. Department of Veterans Affairs Regional Office, Winston-Salem, N.C. and American Federation of Government Employees, Local 1738*,

66 FLRA 34 (August 25, 2011); and *U.S. Department of Veterans Affairs and National Association of Government Employees (NAGE)*, 72 FLRA 194 (April 23, 2021). This is consistent with U.S. Supreme Court case law precedent on procedural and substantive arbitrability from over sixty years ago in the Steel-workers Trilogy of 1960 [see *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steel-workers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steel-workers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960); and, progeny]. While it has been modified somewhat since then, the basic and long-standing tenet of the U.S. Supreme Court still being followed by arbitrators is that doubts concerning the arbitrability of a dispute should be resolved in favor of arbitration. This doctrine of presumptive arbitrability standard continues to prevail.

Merits of the Grievance of the Parties' Arguments

AFGE Council 222 challenges HUD and REAC management's interpretation of OPM regulation at 5 CFR § 531.605 as being incorrect and a violation of said OPM regulation, which states at paragraph (a)(2):

> **§531.605 Determining an employee's official worksite.**
>
> (a)(1) Except as otherwise provided in this section, the official worksite is the location of an employee's position of record where the employee regularly performs his or her duties.
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> (2) **If the employee's work involves recurring travel or the employee's work location varies on a recurring basis**, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, **subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work.** [emphasis added]
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> (3) An agency must document an employee's official worksite on an employee's Notification of Personnel Action (Standard Form 50 or equivalent). …

The REAC Construction Analysts and other affected bargaining-unit staff have recurring travel positions, spend all of their time in the field traveling throughout the United States, and perform the vast majority of their work hours away from their homes well beyond the geographic limits of their local commuting areas. OPM regulation at 5 CFR § 531.605(a)(2) is clear that for recurring travel positions, the **"official worksite must be in a locality pay area in which the employee regularly performs work."** It is arbitrary, capricious, unreasonable, and an abuse of discretion for REAC and HUD management to determine that the official duty stations are where the affected REAC employees' homes are located when these employees spend and perform the vast majority of their work hours away from their homes in recurring travel outside of the geographic limits of their local commuting areas traveling throughout the entire United States on a full-time basis.

OPM's guidance on its website for interpreting 5 CFR § 531.605 is consistent with the Union's position on the meaning of the regulation for recurring travel positions:

> Policy, Data, Oversight
> PAY & LEAVE
>
> **Fact Sheet: Official Worksite for Location-Based Pay Purposes**
> Certain location-based pay entitlements (such as locality payments, special rate supplements, and nonforeign area cost-of-living allowances) are based on the location of the employee's official worksite associated with the employee's position of record. The official worksite generally is the location where the employee regularly performs his or her duties. If the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, **subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work**. An agency must document an employee's official worksite on the employee's Notification of Personnel Action (Standard Form 50 or equivalent). (See "Duty Station" blocks 38 and 39 of the Standard Form 50 showing the city/county and state in which the official worksite is located.)
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> *Source*: https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/official-worksite-for-location-based-pay-purposes/

Furthermore, if the affected REAC bargaining-unit employees were regularly working from their homes since mid- to late-March of 2020, it was because of the Coronavirus pandemic (COVID-19) as HUD and REAC management suspended working in the field for on-site inspections of properties to protect the affected employees' health and safety from the deadly virus. HUD instituted mandatory and then maximum telework flexibilities at home five (5) days per week for all employees due to COVID-19. It is unconscionable and underhanded exploitation for HUD and REAC management to now use the assignment of work during the COVID-19 pandemic at REAC employees' homes during mandatory and maximum telework flexibilities as a basis to change their official duty stations to substantially cut their pay. This was a temporary change and REAC staff have already started traveling again throughout the United States. OPM's guidance on its website also addresses this issue of temporary changes to the work location does not necessarily change the permanent official duty station determination:

> Temporary Changes in Work Location
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> An employee's work location may change on a temporary basis. Such a change may or may not affect the employee's official worksite, as explained in the following paragraphs:

- If an employee is in temporary duty travel status away from the official worksite for his or her position of record, the employee's official worksite and associated pay entitlements are not affected.
- If an employee is temporarily detailed to a position in a different location, the employee's official worksite and associated pay entitlements are not affected.
- If an employee is authorized to receive relocation expenses under 5 U.S.C. 5737, in connection with an extended assignment resulting in temporary change of station, the worksite associated with the extended assignment is the official worksite. (See 41 CFR 302-1.1.)
- If an employee is temporarily reassigned or promoted to another position in a different geographic area, the temporary work location is considered the official worksite for pay purposes.

  Source: https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/official-worksite-for-location-based-pay-purposes/

AFGE Council 222 will be submitting shortly a Request for Information (RFI) pursuant to 5 U.S.C. § 7114(b)(4) to get copies of the travel authorizations, vouchers, and inspection reports of the affected REAC Construction Analysts and other bargaining-unit staff for the past three years to demonstrate that these employees are regularly traveling the vast majority of their time away from the geographic limits of the local commuting areas near their homes throughout the entire United States.

Moreover, many of these affected REAC Construction Analysts and other bargaining-unit staff accepted HUD's employment offer upon hiring because HUD management deliberately offered them the higher locality pay areas as a pay incentive to accept the job offers due to the highly skilled, job qualifications of the positions. This was an intentional decision by HUD management in assigning the official duty stations at the higher locality pay areas for these full-time, recurring travel positions. Not many people are willing to take jobs that require traveling all the time. So higher pay is an incentive to preclude high job turnover for highly skilled positions such as construction analysts and inspectors of the physical conditions of housing. The affected REAC employees as new hires were not aware of OPM bureaucratic regulations on official duty station determinations. It is a factor beyond the affected REAC employees' control the official duty stations initially assigned to them in accordance with Article 28, Section 28.09(4) of the HUD-AFGE Agreement should HUD management possibly try to seek retroactive reimbursement of pay. HUD management is now trying to renege many years later on the higher locality pay offered as a financial incentive to accept the jobs to try to institute substantial pay cuts. Therefore, HUD is now acting in bad faith and not treating the affected REAC bargaining-unit employees with respect, dignity, and in a fair and equitable manner in violation of Article 6, Section 6.01 of the HUD-AFGE Agreement.

Through these changes in the official duty stations of the affected REAC bargaining-unit employees to the local commuting areas near their homes, HUD management has undermined staff's morale with such substantial pay cuts, which is a violation of Article 6, Section 6.05 of the Agreement. These changes to affected REAC employees' duty stations and locality pay entailing substantial pay cuts are not constructive, not cooperative, not collaborative, and deny AFGE

bargaining-unit employees and the Union the opportunity to formulate and implement personnel policies and practices regarding their conditions of employment; therefore, these are violations of the Preamble of the HUD-AFGE Agreement. HUD is also depriving REAC employees of humane treatment, high quality communication between managers and employees by ignoring employees' protests, improvement of the work environment and work conditions, and the substantial pay cuts are likely to lead to lower productivity from these affected employees due to lower morale further violating the HUD-AFGE Agreement at Article 59, Sections 59.01 and 59.03.

Management's Statutory (Unfair Labor Practice) and CBA Bargaining Obligation Violations

HUD and REAC management also failed to notify and bargain with AFGE Council 222 this unilateral change in REAC employees' conditions of employment which has a substantial impact on them through large pay cuts due to the change in official official duty stations and locality pay. Management's rights decisions regarding official duty station determinations and locality pay do not relieve an agency from bargaining the procedures and appropriate arrangements in accordance with 5 U.S.C. § 7106(b)(2) and (3) of the Statute respectively in the implementation of those management's rights. Therefore, this is an Unfair Labor Practice (ULP) in violation of 5 U.S.C. § 7116(a)(1) and (5) as well as a violation of Article 49, Sections 49.02 and 49.03 of the Agreement. It is a ULP for an agency to unilaterally change employees' conditions of employment and to end a long past practice of paying the affected REAC staff higher locality pay prior to bargaining with the Union. *See U.S. General Services Administration (GSA) and American Federation of Government Employees (AFGE), Council 236*, 62 FLRA 341 (January 29, 2008); and *Food Safety and Inspection Service and AFGE National Joint Council of Food Inspection Locals*, 62 FLRA 364 (March 27, 2008). Pay cuts in the thousands of dollars per year range have a substantial impact on the affected bargaining-unit employees' conditions of employments, thus requiring bargaining with the Union. *See U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (September 30, 2020). The Union has the discretion to file a ULP under the negotiated grievance procedures pursuant to the Statute at 5 U.S.C. § 7116(d).

Management's Rights Threshold Issues

Should HUD management claim that official duty station and locality pay determinations concern management's rights to establish its organization or reduce pay, and, therefore, that this subject is not grievable, please be advised that the management rights provisions of 5 U.S.C. § 7106(a) do not provide a basis for determining that an issue is not grievable or arbitrable. The Federal Service Labor-Management Relations Statute (Statute) at 5 U.S.C. Section 7121(c) does not exclude from grievance procedures violations of law, rules or regulations, or collective bargaining agreement provisions that affect management's rights in 5 U.S.C. § 7106(a). *See AFGE Local 1045 and VAMC Biloxi*, 64 FLRA 520 (2010). Conversely, a grievance is arbitrable despite even a successful claim that the resultant award infringes on management's rights. As the FLRA explained in *DHS, Customs & Border Protection Agency and AFGE Local 1917*, 61 FLRA 72, 75 (2005) as quoted below:

> CBP's management's rights arbitrability exceptions are misplaced because they ignore applicable Authority precedent. The Authority has consistently held that the management's rights provisions of Section 7106 of the Statute do not provide a basis for finding grievances non-arbitrable. *See*, e.g., *United States Dep't of the Navy, Pac. Missile Test Ctr., Point Mugu, Cal.*, 43 FLRA 157, 159 (1991); *United States Information Agency*, 32 FLRA 739, 748-49 (1988); *Newark Air Force Station*, 30 FLRA 616, 631-35 (1987) (*Newark*); *Marine Corps Logistics Support Base, Pac., Barstow, Cal.*, 3 FLRA 397, 398-99 (1980) (*Barstow*). As the Authority stated in *Newark*: The proper phase of the arbitration proceeding in which to determine the impact or application of Section 7106 is not at the outset so as to preclude by law an arbitrator from having jurisdiction over the matter. Rather, the determination as to the impact or application of Section 7106 is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy. *Newark*, 30 FLRA at 634. See also *Barstow*, 3 FLRA at 399 (nothing in Section 7106 precludes an arbitrator from reaching the merits of a grievance alleging violations of provisions of the collective bargaining agreement). Consequently, insofar as CBP's exceptions contend that the grievance in this case is not arbitrable based on management's rights under Section 7106 of the Statute, the exceptions do not provide a basis for finding the award deficient.

Recent FLRA case law confirmed that bargaining-unit employees may file grievances concerning violations of law and procedures or appropriate arrangements in collective bargaining agreements negotiated pursuant to the Statute at 5 U.S.C. Section 7106(b)(2) and (3). An arbitrator has the authority to find a violation of law or collective bargaining agreement provision and award a remedy even if they affect management's rights as long as the remedy reasonably and proportionally relates to the violation, and the violation interpretation does not excessively interfere with management's rights under 5 U.S.C. Section 7106(a). *See U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33*, 70 FLRA 398 (February 22, 2018). In the instant GOP, the Union is trying to hold the Agency accountable for complying with OPM regulation at 5 CFR § 531.605, the Statute and Agreement on bargaining changes in conditions of employment, and the procedures and appropriate arrangement provisions in the HUD-Agreement negotiated pursuant to 5 U.S.C. § 7106(b)(2) and (3) of the Statute cited above.

In accordance with Article 51, Section 51.01(1) and (2) of the HUD-AFGE Agreement and the Federal Service Labor-Management Relations Statute at 5 U.S.C. § 7103(a)(9)(B) and (C), the Union reserves the right to raise and grieve **any** violation, misinterpretation, or misapplication of **any** provision of the HUD-AFGE Agreement, law, rule or regulation affecting the REAC bargaining-unit employees' conditions of employment related to the changes in official duty stations and locality pay in this GOP or arbitration. There is no provision in Article 51 or Article 52 of the Agreement that prohibits changes.

Remedies Requested

To resolve this Grievance of the Parties, AFGE Council 222 requests the following equitable relief remedies from HUD management:

(1) Rescind the notifications of the proposed changes in official duty stations for the affected REAC bargaining-unit employees.

(2) The affected REAC bargaining-unit employees shall retain the original official duty stations they were assigned to when they were initially hired by HUD.

(3) Provide back pay and interest to any affected REAC bargaining-unit employee whose official duty station and locality pay were already changed pursuant to the Back Pay Act of 1966 at 5 U.S.C. § 5596(b)(1)(A)(i) and (2)(a).

(4) Pay the Union's attorneys fees to recover the affected REAC bargaining-unit employees' back pay and interest for the changes in official duty stations and locality pay should the Union have to invoke and prosecute this GOP in arbitration pursuant to the Back Pay Act of 1966 at 5 U.S.C. § 5596(b)(1)(A)(ii).

(5) Pay all arbitration fees and expenses in accordance with Article 52, Section 52.04 of the HUD-AFGE Agreement.

(6) Send an email posting to all AFGE bargaining-unit employees nation-wide as well as a physical posting in all HUD offices in which AFGE Council 222 is the national consolidated exclusive representative that HUD committed an Unfair Labor Practice (ULP) and will not change bargaining-unit employees' conditions of employment prior to bargaining with the Union. An electronic posting is an appropriate remedy available for a ULP violation. S*ee U.S. Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City and American Federation of Government Employees (AFGE), Council of Prison Locals 33, Local 171*, 67 FLRA 222 (January 31, 2014). The parties can negotiate the specific language to be sent by email and physically posted.

(7) Any other remedy available to the fullest extent of the law, rule, regulation, policy, CBA, or past practice. There is no provision in Article 51 or Article 52 of the Agreement that prohibits changes in remedies requested.

These remedies are reasonably and proportionately related the OPM regulatory (5 CFR § 531.605), Statutory and CBA violations cited above and do not excessively interfere with management's rights provisions in 5 U.S.C. § 7106(a) in accordance with *U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33*, 70 FLRA 398 (February 22, 2018). The remedies merely seek REAC and HUD management's compliance with the OPM regulation, Statutory requirements and CBA provisions cited above.

Meeting

The Union is not requesting a meeting to discuss this Grievance of the Parties. Therefore, in accordance with Article 51, Section 51.15(3) of the HUD-AFGE Agreement, please provide your response within 30 days.